me personally. I do not have these cheques. I have no income tax returns."

It was not surprising that the learned judge rejected Ex. P13 as a true statement of accounts and we would have done the same having regard to the nature of the evidence adduced before the trial court. On this finding, it seems to follow that the learned judge also rejected the returns submitted for the months of June and July 1981 for the purposes of computing Service Tax. We think the inflated figures were inserted in order to boost the claim of the appellant against the respondent. Without Ex. P13 there was no credible evidence to support the claim of the appellant for loss of profits at $64,000/- per month or the claim of $1,728,000/- under item (a). That however, was not the end of the matter. The appellant's claim against the respondent was substantially one for wrongful determination of the tenancy agreement. Under the terms of this agreement the respondent covenanted to sublet the third floor of the Abad Century Hotel to the appellant for a fixed period of 3-year commencing on November 1, 1980, for the sole purpose of operating a recreation or health centre only. The appellant was ordered by the respondent to cease operating the business with effect from August 30, 1981 after having managed it for ten months. And there were still twenty-six more months to run. At page 16 of her judgment the learned judge found that since the start of the business the appellant's agent had been underdeclaring the gross income of the recreation centre when submitting the monthly returns to the Customs Department for the purpose of computing the Service Tax. As a result of some investigation carried out by the Customs Department the Service Tax payable by the appellant was readjusted upwards. This amounted to $46,877.45 inclusive of penalties.

In the judgment the learned judge did not make any specific finding as to the amount of the under-declared gross income. Nor did the appellant adduce any evidence to support this finding. However, the onus was on the appellant to prove his case and he had a corresponding duty to mitigate his economic loss. In the context of this case, in our opinion, since the Customs Department had imposed an additional Service Tax and penalties of $46,877.45 on the appellant based on statements of accounts which had been rejected by the trial judge and confirmed on appeal by this court, we think that having regard to the finding of the learned judge that the appellant's agent had deliberately underdeclared his gross income to the Customs Department since the commencement of the business, a fair sum to be awarded as damages would be the additonal sum which the appellant was ordered to pay to the Customs Department. We therefore set aside that part of the judgment of the learned judge in which she made no award and substitute therefor the sum of $47,000.00 as damages for loss of profits. Consequently, we amend the figure in the judgment from $67,300.00 to $114,300.00. Save for this adjustment, both the appeal and cross-appeal are dismissed. As regards costs we order that the respondent pay to the appellant one-half of the taxed costs of this appeal. The deposit to be refunded to the appellant.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Ariff & Co.*

BROWN & ROOT (LABUAN) SDN. BHD. v. PADA SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 29 & October 1, 1986]

[Kota Kinabalu – Supreme Court Civil Appeal No. 354 of 1985]

Equity – Constructive trust – Frustrated contracts – Unjust enrichment – Defective pleadings – Civil Law Act, 1956, s. 15.

Contract – Frustrated contract – Unjust enrichment – Civil Law Act, 1956, s. 15.

In this case the appellants owned a piece of land on which were six units of bungalows. They entered into an agreement whereby the respondents agreed to buy and the appellants agreed to sell the property. Payment was to be made in two lump sums. The first payment of $190,000 was paid on the date of execution and the balance was to be paid on or before November 31, 1983. Vacant possession of the bungalows was to be given on the execution of the memorandum of transfer on November 31, 1983. However the appellants gave vacant possession of the bungalows to the respondents before the execution of the memorandum of transfer. The agreement provided that in the event of the agreement becoming impossible of performance due to acts of the Government, the appellants shall on demand by the respondents refund all the monies received under the agreement. The land and bungalows were acquired by the Government and the respondents gave notice of the revocation of the agreement and requested for the refund of $190,000. In their defence the appellants admitted the respondent's claim but claimed a set-off for rentals received by the respondents. It appeared that the respondents had allowed Sacon Construction Sdn.

Bhd. the use of the bungalows without payment and the latter had entered into an arrangement with E.D. Zublin A.G. for the use of the bungalows. The respondents applied to strike out the counterclaim and for an order for summary judgment. The learned trial judge ordered the appellant's counterclaim to be struck out and entered judgment for the respondent. The appellant appealed. The appellant's claim had been based on the equitable principles of unjust enrichment and constructive trust. However on appeal, the appellants abandoned his grounds on constructive trust.

Held, dismissing the appeal: (1) the learned judge was correct in stating that unjust enrichment was irrelevant in the light of the facts of the case, as the claim about the respondent's having to account to the appellants for having received the rents or not having received it, had not been provided for under the agreement;

(2) in any case the question of unjust enrichment had not been properly pleaded in this case.

Case referred to:

(1) *Lee Phek Choo* v. *Ang Guan Yau* [1975] 2 M.L.J. 146.

SUPREME COURT.

Richard Barnes for the appellants.
Joseph Ambrose Lee for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): The appellants appealed against the decision of the learned Judge in that he considered the equitable principles of unjust enrichment and constructive trust to be irrelevant. In the course of argument we referred appellants to the case of *Lee Phek Choo* v. *Ang Guan Yau*[1] Although this is a Sarawak case the law in Sabah is the same as in Sarawak as regards the applicability of the Statute of Frauds. Accordingly, the appellants abandoned his ground on constructive trust.

For the purpose of this appeal the facts may be set out briefly. Appellants and respondents are both limited companies. Appellants own a piece of land on which are six units of bungalows. On February 3, 1983 they entered into an agreement whereby the respondents agreed to buy and the appellants to sell the property. Payment was to be made in two lump sums. The first payment of $190,000 was to be made on the date of execution and the balance on or before November 30, 1983. Clause 4 of the agreement provides that vacant possession of the six bungalows was to be delivered to the respondents on the execution of the Memorandum of Transfer on November 30, 1983. It is not in dispute that $190,000 was paid by the respondents on the execution of the agreement and that the appellants gave vacant possession of the six bungalows to the respondents before the execution of the Memorandum of Transfer. One of the important terms of the agreement is Clause 8(a) which provides that in the event of the agreement becoming impossible of performance due to acts of either the State or the Federal Government not within the control of either the appellants or the respondents, then the appellants shall, on demand by the respondents, refund all monies received under the agreement. One month after the execution of the agreement the State Government indicated its intention to acquire the said land together with the six bungalows for the Labuan Airport Runway Extension *vide Gazette* Notification No. 32 dated January 20, 1983 under section 4 of the Land Acquisition (Cap.69) Ordinance. The State Government confirmed the acquisition *vide Gazette* Notification No. 155 dated March 3, 1983 under section 5 of the said Ordinance. On January 7, 1983 the respondents gave notice to the appellants of revocation of the agreement and requested for the refund of $190,000. The appellants refused to do so and the respondents sued the appellants. In their defence the appellants admitted the respondents' claim but alleged that this was subject to a set-off against rentals received by the respondents. By paragraph 6 of their counterclaim the appellants alleged that the respondents leased the six bungalows to E.D. Zublin A.G. and that therefore the rentals received "represented monies collected by the plaintiffs to the account of the defendants and that the plaintiffs held such monies in trust for the defendants."

The respondents allowed Sacon Construction Sdn. Bhd. the use of the six bungalows without payment of rent. The latter entered into an arrangement with E.D. Zublin A.G. for the use of the use of the six bungalows.

The respondents took out two summonses, one under 0.18 r. 19 of the Rules of the High Court, 1980, to strike out the counterclaim and the other under 0.14 for summary judgment. During the hearing of the first summons the parties agreed that the only issue before the court was whether the appellants were entitled to the alleged rentals for the six bungalows.

It was contended that the respondents, in obtaining possession of the six bungalows, received a valuable benefit. It is the contention of the appellants that since the full purchase price has not

been paid the appellants remain the legal owner of the property and all profits from the property rightly belong to the appellants. Although the agreement was silent on this, the appellants argued that under section 15 of the Civil Law Act, 1956 the respondents were accountable to the appellants for the benefit arising out of the renting of the six bungalows. Hence, on the principles of unjust enrichment the parties should be placed in the same position as if the agreement had not been frustrated. The appellants alleged that the respondents rented the six bungalows through Sacon Construction Sdn. Bhd.

In answer the respondents maintained that section 15 of the Civil Law Act, 1956 did not apply and that the principles of unjust enrichment as claimed by the appellants could not succeed. First, the terms of the agreement, particularly clause 8(a), are clear in that only monies received under the agreement are to be refunded. Secondly, the respondents did not enter into any arrangement with E.D. Zublin A.G. in respect of the six bungalows. Thirdly, Sacon Construction Sdn Bhd. is a separate entity even though one director is also the director of respondents. On the particular facts, the learned Judge quite rightly refused to hold that there was a nexus between Sacon Construction Sdn. Bhd. and the respondents to justify the court in lifting the corporate veil. As long as the respondents comply with the terms of the agreement the appellants could not complain against the respondents for the use of the property.

Having heard the parties the learned Judge granted the respondents' application and ordered the appellants' counterclaim to be struck out. The court entered judgment for the respondents in the sum of $190,000 with interest at 8% per annum from date of judgment to date of realisation and costs. The learned Judge stated at page 17 of the Appeal Record:

". . . . Apart from interpreting what was within the four corners of the agreement to the Court's mind what was more fair than that the Respondents be refunded their money exclusive of any interest from the date of agreement (being interest not also provided for under the agreement) and the *quid pro quo* for it Appellants had the free use of the Respondents' money during that period while the Respondents had use of the six bungalows during the same period and up to this judgment. All the claim about the Respondents' having to account to the Appellants for having received rents or not having received it the Court dismissed as being irrelevant as not having been provided for under the agreement. . . . ".

Although the question of unjust enrichment was argued in the court below and here, a careful perusal of the pleadings did not show that this was properly pleaded. No objection was taken by the respondents on this as the respondents' counsel referred to unjust enrichment in his affidavit. If we had been fully aware at the outset of all the circumstances we would not have allowed the appellants to raise the issue after abandoning the ground of constructive trust. It was after the hearing and preparing our judgment that we looked carefully at the pleadings that we realised how scanty, through no fault of the appellants, were the materials on which such an issue could be raised. Nevertheless, we do not think the learned Judge had come to the wrong conclusion when he stated that unjust enrichment was irrelevant in the light of the facts of the case

Out of respect to the parties we decided to deal with their submissions. However, we decided not to go further into the meaning of unjust enrichment as a principle of liability as the appellants' claim however phrased must fail in this case.

We would dismiss the appeal with costs to the respondents. The deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Shelley Yap Leong Tseu Chong Chia & Co.; Lee & Co.*

ENG NGAK HUA & ORS. v. AHMAD NORDIN BIN HAJI MAZLAN & ANOR.

[O.C.J. (Siti Norma Yaakob J.) April 25, 1984]

[Kuala Lumpur – Civil Suit No. P.61 of 1983]

Road Traffic – Oncoming car colliding into unlighted stationary lorry – Whether defendants negligent or alternatively nuisance.

Damages – Quantum – Motor accident – Two injured and one deceased – Second plaintiff and deceased's dependants innocent – Principles in assessing quantum.

At 12.30 a.m. on June 29, 1982, an accident occurred between a car driven by the first plaintiff and an unlighted stationary lorry, BM 2093, under the first defendant's control and belonging to the second defendant. The lights and engine of the lorry had malfunctioned whilst the first defendant was driving it along a straight stretch of road of 700-800 feet. The first defendant then parked the lorry on the correct half of the road in order to repair it but left no room for two cars to pass each other safely. The first plaintiff, unaware of its presence, ploughed right into the